UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. KINGSLEY R. CHIN, ADITYA HUMAD, and SPINEFRONTIER, INC., Defendants.	Criminal Action No. 1:21-cr-10256-IT

BEFORE THE HONORABLE INDIRA TALWANI, DISTRICT JUDGE

MOTION HEARING

Thursday, March 28, 2024
10:05 a.m.

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts

Robert W. Paschal, RMR, CRR
Official Court Reporter
rwp.reporter@gmail.com

A P P E A R A N C E S

On behalf of the Government:

UNITED STATES ATTORNEY'S OFFICE
BY: ABRAHAM R. GEORGE
PATRICK M. CALLAHAN
CHRISTOPHER R. LOONEY
One Courthouse Way
Suite 9200
Boston, MA 02210
(617) 748-3152
abraham.george@usdoj.gov
patrick.callahan@usdoj.gov
christopher.looney@usdoj.gov

On behalf of the Defendant Kingsley R. Chin and SpineFrontier, Inc.:

POLLACK SOLOMON DUFFY LLP
BY: BARRY S. POLLACK
JOSHUA L. SOLOMON
31 St. James Avenue
Suite 940
Boston, MA 02116
(617) 439-9800
bpollack@psdfirm.com
jsolomon@psdfirm.com

On behalf of the Defendant Aditya Humad:

FICK & MARX LLP
BY: WILLIAM W. FICK
DANIEL N. MARX
24 Federal Street
4th Floor
Boston, MA 02110
(857) 321-8360
wfick@fickmarx.com
dmarx@fickmarx.com

P R O C E E D I N G S

(In open court at 10:05 a.m.)

THE DEPUTY CLERK: United States District Court is now in session, the Honorable Judge Indira Talwani presiding.

This is Case Number 21-cr-10256, United States v. Kingsley R. Chin, Aditya Humad, and SpineFrontier, Inc. Will counsel please identify themselves for the record.

MR. GEORGE: Good morning, Your Honor. Abraham George for the United States.

THE COURT: Good morning.

MR. CALLAHAN: Good morning, Your Honor. Patrick Callahan, also for the United States.

THE COURT: Good morning.

MR. LOONEY: Good morning, Your Honor. Chris Looney, also for the United States.

THE COURT: Good morning.

MR. POLLACK: Good morning, Your Honor. Barry Pollack on behalf of Dr. Kingsley Chin and SpineFrontier, Inc.

THE COURT: Good morning.

MR. SOLOMON: Good morning, Your Honor. Joshua Solomon, also on behalf of Dr. Chin and SpineFrontier.

THE COURT: Good morning.

MR. FICK: Good morning, Your Honor. William Fick for Mr. Humad, who is here with us.

THE COURT: Good morning.

MR. MARX: Good morning, Your Honor. Daniel Marx for Mr. Humad.

THE COURT: Good morning.

Okay. I have these three motions, and I have another hearing at 11:00, so we're going to try and get through whatever we can, and I may be going back and re-reading some of these things as we work our way through.

I'd like to start with the motion to dismiss Count 8.

MR. SOLOMON: That would be me, Your Honor.

Does Your Honor -- it's been a while since I've been live here. Does Your Honor have a preference for the lectern or here?

THE COURT: Whatever anyone wants to do is --

MR. SOLOMON: Thank you.

THE COURT: -- fine.

MR. SOLOMON: Well, thank you, Your Honor.

Again, Joshua Solomon on behalf of SpineFrontier and Dr. Chin. This motion is also brought on behalf of Mr. Humad as well.

The primary issue that this motion to dismiss the money laundering count raises is whether the money laundering charge adequately separates the alleged money laundering scheme and the conduct behind that scheme from the alleged

underlying kickback charges.

And the problem with the indictment as charged is particularly well illustrated by paragraph 44 of the indictment, which is really the substantive paragraph for this count. And it alleges that money was transferred from SpineFrontier to IME for the purpose of paying bribes and that that money that was transferred was the proceeds of those bribes. And it's that structure of the charge that gives rise to the so-called merger problem that our motion has raised.

The government's opposition to the motion contains quite a bit of argument about general principles; in, particular, principles regarding double jeopardy. But it largely allides over the way the prosecution in this case -- somewhat unusually in sort of an odd framing of the count -- chose to actually charge the money laundering count.

And it's important to keep in mind in that regard as I go through this -- and I'll say more about this in a minute -- that this is not a promotional money laundering charge. This is a concealment-only money laundering charge.

THE COURT: I think I'd like to start with that point and pose a question here to the government. They do make that distinction, and then you respond and argue that much of their legal argument falls out since it's not a promotional count.

Is there any dispute that the only -- the only aspect of money laundering we're talking about here is concealment?

MR. LOONEY: No. We're talking about concealment money laundering. That's clear.

THE COURT: Okay. So then my question turns to you on the concealment aspect, which is -- or, well, with your whole argument, which is do I need to make my way -- should I be starting with the constitutional arguments that you're raising, or should I be starting with your argument that the concealment allegations are insufficient?

MR. SOLOMON: I -- well, I think there are two, in a sense, alternative arguments. Either could be a ground on its own for dismissal, and I'm happy to start wherever Your Honor would prefer.

THE COURT: So let's start with the concealment --

MR. SOLOMON: Sure.

THE COURT: -- how you view the concealment allegation as insufficient.

MR. SOLOMON: Yes. This is -- as I mentioned in the beginning, this is sort of an odd indictment in a couple ways. One is what I mentioned, that they -- they allege that the -- that the money was transferred for the purpose of paying bribes, which would normally be the way you would frame a promotional money laundering, because you say you're

taking the proceeds from one crime and trying to promote another. But that's not -- while they plead it that way, they don't claim promotional money laundering.

But the other aspect is that there simply was no concealment. And there are matters of public record, literally hundreds of disclosures in SpineFrontier's own name, things the Court can take judicial notice of because they're on a public government website from public sources.

We've included the material with the motion to dismiss Counts 1 through 7, which Mr. Pollack is going to get into in more detail. But SpineFrontier actually disclosed in its own name and not in IME's name ever that -- and the government doesn't contest this. They didn't contest it in our meet-and-confers. They don't contest it in their opposition. The disclosures were made.

So put most simply, there was not any concealment, yet this is --

THE COURT: Well, the disclosure that they're taking about here is not -- the concealment they're talking about here isn't concealing that SpineFrontier sometimes paid doctors. Their charge is that SpineFrontier paid IME to pay doctors, and that wasn't disclosed.

MR. SOLOMON: Well, no, I believe what their charge is, is that SpineFrontier used IME to conceal the fact that SpineFrontier was the one making the payments. That's what

the indictment --

THE COURT: But the money -- yes. As to the payment -- they're not saying as to every single payment SpineFrontier ever made, but as to the payments made by IME, that was SpineFrontier using IME, concealing payments to IME that were going to go to the doctors.

MR. SOLOMON: And those payments, the ones that went through IME, were fully disclosed as originating with SpineFrontier. And I don't think they contest that.

THE COURT: Is that true?

MR. LOONEY: They weren't disclosed -- there were Sunshine Act disclosures made about those.

THE COURT: Wait, wait, wait. There were Sunshine Act disclosures made about payments that SpineFrontier paid to IME?

MR. LOONEY: Paid to doctors --

THE COURT: No, I'm not --

MR. LOONEY: -- through IME.

THE COURT: Oh.

MR. LOONEY: Yeah. But IME is this dummy, shell organization, whose sole purpose was so that --

THE COURT: Now I'm really confused. So I had understood the papers to say that some of the time SpineFrontier was disclosing under the Sunshine Act payments it was making to surgeons; and some of the time, IME was

disclosing payments made to surgeons, but at no time was SpineFrontier disclosing that it was the one that was the entity behind the IME payments. Or at least it wasn't disclosing its relationship.

But are you saying that SpineFrontier was making disclosures of the payments that IME was paying to doctors?

MR. LOONEY: Yes. And so the money went from SpineFrontier to IME to doctors. Those were disclosed as payments from SpineFrontier to doctors.

IME was this dummy organization put in place, and what we expect the evidence will show is that SpineFrontier and its representatives told the doctors IME is there to protect you from disclosures.

THE COURT: Right. And the letters say that; IME is there to protect you, the doctor, from the notion that you're getting paid by the manufacturer of this device. They told that to the doctors, and so I'm not here challenging your AKS charges.

The question is: What's the concealment that makes up the money laundering charge?

MR. LOONEY: It --

THE COURT: And I thought your argument was they were concealing -- the money laundering was, in your view, taking -- being secret about money coming from SpineFrontier to IME, and you're saying that's not the concealment. So

tell me what the concealment is, because I'm not following it.

MR. LOONEY: The concealment conspiracy is that they told -- held out to doctors that they would -- that --

THE COURT: That they would get away with -- they wouldn't get in trouble for what's happening.

MR. LOONEY: Yes.

THE COURT: But that's not money laundering.

MR. LOONEY: Well, that will conceal the nature, the source, the ownership that these are SpineFrontier funds because we're making them appear to be IME funds that are going to the doctors.

THE COURT: So, as you all know, I don't come to this job with an extensive background in criminal law, so I'm just making my way through this. But my understanding of what we're talking about with money laundering is that someone has unlawful proceeds.

MR. LOONEY: Yes.

THE COURT: And because they have unlawful proceeds, their -- but they want to use their unlawful proceeds, and so they do various things to hide the use of their unlawful proceeds so that those unlawful proceeds aren't being tracked to the unlawful activity. That's what I -- that's my very simplistic understanding of money laundering.

I don't get how this falls under that. And maybe my simplistic understanding of money laundering is wrong, so feel free to push that, but --

MR. LOONEY: I think there are two issues that are two factual or sufficiency issues at play. One is whether the funds are proceeds, which is the merger issue; and then one is whether there is an act of concealment. Is that --

THE COURT: My question is: Don't you have to have an act of concealment of unlawful gains?

MR. LOONEY: Yes. Absolutely.

THE COURT: So it's both sides of it. It's not -- so that's my question. What's the concealment of unlawful gains? I hear where they're saying, "Hey, Doc, we're going to tell the outside world we're separate entities, and that will protect you." That seems to me pretty bad evidence for them as to what kind of an arrangement they were setting up. I get why that is relevant and of issue in the AKS.

I just don't understand how that means that they're conceal- -- and I don't really quite get how you're going to show that the money that's going -- I mean --

MR. LOONEY: So IME is set up. It is -- it was held out as an independent entity, that it was a third party, that this is all arm's length, when, in fact, it was just a dummy corporation with no function other than SpineFrontier could put money in there, and then that company could

transfer the money to the doctors.

THE COURT: Right. Clearly understand why --

MR. LOONEY: And doctors could then say, "We're receiving money -- the source of this money, the ownership is IME. We're not receiving money from SpineFrontier." So the doctors were able to say -- it was -- concealed the fact that they were receiving money --

THE COURT: Right.

MR. LOONEY: -- from IME.

THE COURT: Concealed the fact that they were part of a conspiracy here to get -- I understand that part of your theory.

MR. LOONEY: Concealed the source and the ownership of the funds.

THE COURT: But not the -- concealing that the funds are illegal.

MR. LOONEY: I don't think it has to conceal that the funds are illegally gained. The transaction has to involve --

THE COURT: Well, does the transaction have to involve illegal funds?

MR. LOONEY: It definitely has to involve illegal funds.

THE COURT: Okay. And here are you saying the problem here is that once this circle starts, therefore,

every transaction after the circle starts must have funds that are unlawfully gained?

MR. LOONEY: I think that's something -- we will have to show that the funds transferred to IME were proceeds, and that's a factual question about what we'll have to show.

But I think -- so I think it falls squarely within the cases, and I want to walk through them. I don't know if it's my turn now, but -- so you can have multiple phases of --

THE COURT: You can sit down.

MR. LOONEY: -- of an illegal arrangement. So --

THE COURT: But, remember, on those cases -- I will go back and read all of those cases -- are any of them concealment cases? Are all of them concealment cases?

MR. LOONEY: Very few are concealment cases on either side --

THE COURT: Okay.

MR. LOONEY: -- because there is -- there is almost never a double jeopardy merger problem with concealment because it has an additional element.

THE COURT: I'm not worried right now about the double jeopardy. I'm worried whether you've alleged the elements.

MR. LOONEY: The money laundering.

THE COURT: That's my problem.

MR. LOONEY: Yeah. I think we've probably alleged it because we've said they've taken proceeds from their scheme. When they are realized proceeds -- that is from, you know, paying a bribe to a surgeon, the surgeon used SpineFrontier products, the hospital buys new products, SpineFrontier gets revenue -- that money at that point is unlawful proceeds.

They used those proceeds to pay further bribes. And that fits very comfortably within the proceeds definition used by a lot of the cases they rely on, like *United States v. Cloud*. It's a mortgage scheme.

There, there was multiple substantive counts, and the Court said these are not proceeds because you're paying the expenses of the original underlying offense. But then they went on to say, for the conspiracy, the -- we're going to firm the counts because there's a lot of evidence that a person committed mortgage fraud, realized proceeds, kept the money in the account, and then used that to purchase the next set of properties, to engage in the next set of offenses.

And so that proceeds element, it's a factual question of what the evidence will show. Will we be able to show that -- you know, if they used clean, untainted money for each subsequent round, then you could convict on the AKS without convicting on the money laundering charges. We'll have to show that they're taking the proceeds from the

kickbacks --

THE COURT: Okay. So that's the proceeds part. And now the concealment part, they're not concealing it from the doctors. They're telling the doctors, "We've creating this" -- by your allegations here, they're telling the doctors that "We've created this thing so you can get away without an AKS violation here," or Stark law violation or whatever it was going to be, or your Sunshine obligations. But you can get away with those things, but they're telling them there's no concealment.

MR. LOONEY: No, I think the whole purpose of -- that's why IME existed. I mean --

THE COURT: Well, it consisted so you could commit these AKS violations, but it wasn't -- it doesn't -- IME isn't created so that you could hide the illegal proceeding.

MR. LOONEY: But the -- but it concealed the nature, you know --

THE COURT: And that's the question. Is concealing the nature of another crime what the money laundering statute is getting at, or is concealing that the proceeds are unlawfully obtained what the money laundering is getting at?

MR. LOONEY: I think -- and -- that it is -- the defendant has to know that they are proceeds of unlawful activity, and which we've alleged; and then the purpose has to be conceal the ownership, a source of those funds.

THE COURT: Okay.

MR. LOONEY: So it doesn't have to necessarily conceal an act of concealing the crime; it has to be an act of concealing the --

THE COURT: The unlawful nature of --

MR. LOONEY: -- the ownership of the funds.

THE COURT: The ownership or the unlawful nature?

MR. LOONEY: I believe it's ownership of the funds.

THE COURT: Okay. So any time somebody is using a shell corporation, you have a money laundering issue then? You're concealing who's the seller.

MR. LOONEY: As long as the person knows that the fund -- that they're doing transactions in unlawful funds and then they move it through a bunch of things, you know, so the government couldn't seize it.

THE COURT: Okay.

MR. LOONEY: They may not be disclosing the underlying illegality. They're disguising where the funds are and who owns it.

THE COURT: Okay. I'll go back and read the cases, which I have not yet had a chance to do, and make sure I'm not heading in the wrong direction on this. But let me just ask you just a couple of questions in just terms of sort of where I make the decision here and when I make the decision.

It is true that generally there's an allegation of

fact there; I leave that to trial. But to the extent this seems to me more of a legal issue, what you can count in the bucket and what you can't, isn't it the case that if I find on that legal question for the defendant now, that gives you an opportunity to challenge it on the appeal, whereas if I find after trial then -- or after you've presented your case, then you're kind of stuck on it, so that in terms of -- to the extent that this is kind of a little different than any of the cases out there, and I'm thinking the law supports the defendant, doesn't -- isn't the government in, actually, a cleaner position if I go ahead with that now rather than after you put on your evidence, which seems will be likely to be consistent with -- I mean, I don't --

MR. LOONEY: So I -- I think this is a factual issue.

THE COURT: Uh-huh.

MR. LOONEY: I think the two factual issues are: Is it proceeds? Was there an act of concealment?

THE COURT: Okay. And I will go back and look at the case and say, okay, this is purely a factual issue. But if I think it's actually kind of a legal issue --

MR. LOONEY: It might be -- I think if it's purely a legal issue, I think we prevail, and I think we will prevail on here and should prevail on appeal and --

THE COURT: Okay. And if it's a purely legal issue

and I think they prevail, am I correct that if I do this -- if I find for them now, you can, while we're still proceeding and moving things along to trial, you can take this issue up?

MR. LOONEY: Yes, but I would -- I wouldn't -- I'm not advocating that. That is true that it might make the appeal quicker and a pretrial appeal rather than afterwards and those aspects might be easier in some ways; but I would urge you not to take that course, because I think, both in the law and on the facts, we're squarely on firm ground here.

THE COURT: So I hear --

MR. LOONEY: And I --

THE COURT: I absolutely hear you think you're right on the arguments. I get that. I'm really asking you a procedural question. If I disagree with you as to your being right on the issue --

MR. LOONEY: Yeah.

THE COURT: -- and I think that this is a question of law and I find that the defendant has the better argument, am I correct that that -- my making that finding now would give you an opportunity to test the legal question, whereas if I wait until after you've presented your evidence on it and make that legal ruling, you lose your opportunity to test that legal view?

MR. LOONEY: We would if you made that legal ruling before there was a jury verdict, I think. So it kind of

depends how it plays out.

THE COURT: And if I make it after the jury verdict then -- and I'm right -- I forced the cost --

MR. LOONEY: Of the trial.

THE COURT: -- trial.

Okay. I will go back and read the cases. We need to talk about the other motions, but that's somewhere -- that's where I'm leaning right now, but I will go back and read the cases and make sure I'm not off.

Okay. On Counts 1 through 7, I have a few just sort of housekeeping matters. There's a footnote from the defendant that the indictment cites a section about soliciting or receiving remuneration, but that they don't think that's what the allegations are about. Is there any response to that?

MR. GEORGE: Good morning, Your Honor.

It's strictly a typo error.

THE COURT: Okay. And then on the alleged *Brady* act violations and what the government does and doesn't have a duty to do, do we still have a live dispute, or is this just background?

MR. POLLACK: Yes, Your Honor. The -- it's a live dispute. The government has obtained selectively some materials from CMS, produced those, but not generally. And if I can frame what it is, if I heard Your Honor correctly

when you started questioning, there was at least some confusion about whether SpineFrontier made some disclosures or all disclosures.

I want that to be clear, because CMS is in possession of this, of information nobody else is. Every payment at issue in this case, whether it involved IME or not, the money originated with SpineFrontier, and SpineFrontier was disclosed as the payor. And IME was never used for its name as the payor.

THE COURT: Okay. So --

MR. POLLACK: CMS --

THE COURT: -- let me stop you for a minute. Why doesn't SpineFrontier also have those records?

MR. POLLACK: Some of them date back to 2013, Your Honor, and I'm going to be frank; from the access I have had, for months I expected to receive in discovery some disclosures being made by IME because that's what the charges said, was that IME was used to evade the reporting requirements -- never got that.

We've never been able to ensure we have the full universe. Plus, CMS holds itself out as triggering certain internal reports of its own approvals and consistency. And what we expect exists at CMS, and while the government has obtained what it's wanted from CMS, it hasn't obtained what is listed as -- referred to as error reports.

We have a list that we've put. It's four or five topics of reports it's -- CMS maintains that would show that, according to the government, CMS, the alleged victim in this matter, because that's what it's referred to in the related civil case, it self-called these all fine or approved disclosures by SpineFrontier, never hidden that SpineFrontier is a source of the money, as it's alleged, never evading SpineFrontier's reporting -- so we want those reports from CMS.

THE COURT: Let's stick right to the narrow thing.

MR. POLLACK: Yes.

THE COURT: I -- the longer you all deal with me, the more you'll learn I don't like adjectives and just try to get to the facts.

Is there a dispute as to whether all of these payments were disclosed?

MR. GEORGE: Your Honor, there's no dispute that SpineFrontier made Sunshine Act disclosures and that, I believe, every payment that's at issue here was disclosed by SpineFrontier. The dispute is did SpineFrontier disclose to the doctors that IME was not a real company? That's it.

THE COURT: I understand that. I understand there's a different -- that you're charging something different than what the defendant is focused on. I'm just trying to figure out if there's a dispute here.

MR. GEORGE: There is no dispute here, Your Honor. And if I may just add one thing, in the investigation, the government subpoenaed and requested all of this information from SpineFrontier, and it was not produced to us. And we have now agreed, notwithstanding our legal position that we're not required to do so, to go to CMS and request the information they've asked for.

We did produce to them information that was in our position, the litigation team's possession, custody, and control. They have that now. And we will be producing more information from CMS. So on this, I do not believe there is a live dispute.

THE COURT: Okay. So what I'm going to do on this issue is, if you need to bring a motion to compel, you bring a motion to compel. But this isn't a basis for dismissal of Counts 1 through 7.

So -- and I would say I do appreciate being corrected that -- I was under the impression that there was -- IME payments that went through IME were not being disclosed, and I understand -- I now understand that neither side -- there's no factual dispute about that.

But that said, the notion that there can be, as a matter of law, no violation here because the disclosures were made to -- by SpineFrontier, I think you're going too far. You can't get that last part.

MR. POLLACK: I agree with Your Honor on that point. That's not our grounds for dismissal. Our grounds for dismissal is that the same way that -- and I realized this even last night and this morning as I was reading through the government's opposition and how it was framed here at one point is that, oh, no, SpineFrontier made some of the disclosures.

The grand jury was never told that IME never made a disclosure. It was never told that SpineFrontier made all the disclosures. In fact, it was led to believe the contrary by the indictment itself. The same confusion that we as defense counsel had when first reading the indictment and expecting to see IME -- IME's name used in a disclosure for SpineFrontier payment and the same reaction Your Honor had initially to that, there would be absolutely no reason to think that a -- let me go to the test. This is not a *Twombly* motion. We're not saying it's different than the argument that was made about money laundering.

This isn't about the sufficiency of the allegation. It's about whether the grand jury was free from substantial influence of misleading testimony. And it was, Your Honor, because what was presented to the grand jury was that IME was used. Its name was used for disclosures. And we know this because, one -- and I have six reasons why, that that was what the grand jury walked away with and why the government's

reasons in rebuttal do not actually rebut this.

So one of the biggest problems is their reliance at the grand jury on agent summary testimony. It's been a long time since I've presented a case to a grand jury, but I think I appeared a hundred times; and never once did I -- or when I observed one of my colleagues -- did I ever use an agent to testify there was probable cause that each and every paragraph in the crimes -- they were just essentially saying, Your Honor, standing by paragraph 37, which says IME was operated by the defendants to evade Sunshine reporting requirements.

I think we all read that indictment, and it's clear the Sunshine Act is at the center of it and that there was --

THE COURT: To evade the surgeons.

MR. POLLACK: The surgeons' names are used.

THE COURT: To evade their Sunshine Act, their obligations to disclose. Isn't that --

MR. POLLACK: No.

THE COURT: -- what the allegation is?

MR. POLLACK: The manufacturers have a duty to disclose and identify the doctor. And they did. This is what's amazing, Your Honor. It's -- over -- Mr. Solomon's right. There's something like 733 in the public record on the website. There's over a thousand. This is why this is unlike any other case I've seen.

In a failure-to-report type of a case or a concealed reporting case, where the allegation presented to the grand jury is that Mr. Humad, Dr. Chin, and SpineFrontier operated IME to evade sunshine reporting acts, every single payment at issue identified SpineFrontier as the payor and the doctor who received it. It's -- every one of them.

THE COURT: So --

MR. POLLACK: So there's --

THE COURT: Hold on a minute.

I think the one problem with where you're going on this is that the indictment says that they were referencing the payments through IME as a way to avoid Sunshine Act disclosure requirements, but they're not charged with Sunshine Act disclosure requirement failures. They're charged with paying bribes.

MR. POLLACK: Well, they actually --

THE COURT: And the way -- and so the bribe, if the bribe is I'm giving you money to do this, that's one flavor of the bribe. If the bribe is I'm giving you money, and don't worry; you don't have to worry about this being a bribe, we're all fine -- wink, wink; nod, nod -- that still is a kickback violation, not a Sunshine Act violation.

They've just sweetened the bribe. They've sweetened the bribe by saying, "Hey, not only are we bribing you, but no one will find out."

MR. POLLACK: So, actually, I look at it a little differently, Your Honor, than sweetening the bribe, is that the government sweetened the evidence because it knew it had to show specific intent and willfulness. This is a case -- nobody is disputing that the contracts between SpineFrontier and these doctors was improper if it was followed, if the doctors actually did the work required of them, right?

THE COURT: If they did the work required.

MR. POLLACK: If they did the work, a hundred percent, Your Honor, if they did -- substantially performed is probably the test; but, yes, if they did the work.

And -- but the government knew to indict it needed to show a specific intent from the outset. They're essentially turning a failure to perform down the road into a specific intent from the beginning. I mean, that's what they need to show --

THE COURT: If you -- if you -- they are using -- they want to draw an inference from the failure to perform down the road, combined with reassurances that you can bill for the same time that you're in surgery; and, wink, we're putting this payment through here so you don't have to worry about the Sunshine Act. They're saying all of that was to cause the doctors to do it.

They're not simply saying, hey, at the end of the

day, it turned out the doctors didn't do the jobs that SpineFrontier was anticipating they would. They're going to have to make that proof, and whether they can do that or not is not in front of me.

The question is they're trying to make the proof, and the fact that they set up this IME and they told the doctors, "Hey, doctors, this IME is going to help you avoid any problems here."

MR. POLLACK: I agree with just about all of that in the way I analyzed this as well, we analyzed this as well, Your Honor. What is different, though, is that I think everyone has to agree there are two very different cases. One where -- one where IME's name was actually used in place of SpineFrontier's name would present a different case.

THE COURT: It would be --

MR. POLLACK: And Your Honor thought that's what this case was from reviewing the papers.

THE COURT: And having now clarified what that difference is, it will certainly be something I will go back and read the indictment now with that in mind. And, you know, I don't know how much I jump to a conclusion here or not.

MR. POLLACK: But here's what I want Your Honor to think about when you do that: The grand jury didn't have the benefit of us pointing out the mistake to you, and it's not

just a mistake, Your Honor. It very much changes the nature of the case. Your Honor took it as the government alleging in that indictment, and the summary testimony by Agent Lambert told the grand jury that there was probable cause to believe they evaded it.

And all -- their response is, "No, we told the grand jury through two witnesses that some disclosures were made by SpineFrontier," which Your Honor thought from the beginning of this hearing and we thought, you know, some were made by SpineFrontier and some were made by IME.

This grand jury was never informed -- and it was informed actually to the contrary -- it was never informed that IME's name was never used in a disclosure. So when it viewed this case and tried to decide are we looking at a breach of contract or are we looking at a specific intent offense from the beginning, this grand jury had that same misimpression, Your Honor, that IME's name was used.

And nothing that the government has cited is to the contrary. When they cite to testimony by [redacted] and Amanda Dalton --

MR. GEORGE: Your Honor -- Your Honor, this is grand jury testimony. There's no 6(c). They should not be naming witnesses in a public open courtroom that testified before the grand jury. We've talked about this in our filing. They need to stop.

MR. POLLACK: Real easy. Ms. Dalton --

THE COURT: So hold on a minute.

I think when counsel raises a complaint about using someone's name, the answer isn't to say, "Real easy, let me say the name again." Please sit down.

MR. POLLACK: Your Honor, she's not a grand jury witness. She wasn't a grand jury witness. That --

THE COURT: Okay. Here's the question. And just -- I'm sorry. We have a limited amount of time.

Here is the question that I do have for the government. I maybe read these papers too fast, but I was under the impression after I read these papers that IME was making its disclosures, and SpineFrontier was making its disclosures.

Was the grand jury presented evidence as to what IME was doing as to its disclosures or not disclosures?

MR. GEORGE: The grand -- IME never made any disclosures. The grand jury was never told that it did, and the government has never presented any information that IME ever made any disclosures. Mr. Pollack --

THE COURT: Okay. But was -- what was the government -- what was the grand jury told -- give me the sum and substance about what the grand jury was told about disclosures.

MR. GEORGE: Yes, Your Honor. I can and it's in

our papers. And with respect to the grand jury information that I'm going to talk about, I'm just going to use initials, if that's okay with Your Honor.

THE COURT: That's fine.

MR. GEORGE: The government presented a number of witnesses before the grand jury, including witness S.C. Her testimony was that she looked at open payments when she was a current employee of SpineFrontier, saw that there was a doctor that she worked with, and that he made, in her mind, a lot of money per SpineFrontier's disclosure in the Sunshine Act.

And the point for purposes of this motion is that the government -- me, Your Honor -- presented through this witness documents to the grand jury that showed SpineFrontier's Sunshine Act disclosures. Another witness testified in CID, and that witness also said that SpineFrontier made Sunshine Act disclosures.

So, Your Honor, rather than the government misleading the grand jury, with all due respect --

THE COURT: Okay. I really don't want to spend a lot of time with everybody making allegations of who's misleading whom. I'm just trying to get to the facts here. So hold on a minute.

MR. GEORGE: Okay.

THE COURT: I understand in the government's

argument that the case isn't about, at the end of the day, Sunshine Act violations.

MR. GEORGE: Correct, Your Honor.

THE COURT: The case is about bribes. I understand that.

MR. GEORGE: Absolutely, correct, Your Honor.

THE COURT: I'm just trying to figure out -- and I walked in here on this one being prepared to rule for the government on 1 through 7, but I want to make sure, given that I had a misimpression here, trying to figure out if the grand jury would similarly have had a misimpression here as to anything about the Sunshine Act.

MR. GEORGE: No, Your Honor. It's not possible. And if I could just point you to the indictment, what the indictment says is that as one of eleven subparagraphs of the manner and means just of the conspiracy count, nothing to do with Counts 2 through 7, one subparagraph says one thing that they -- the defendants did is, quote, "holding out IME as a separate and independent entity from SpineFrontier in part and to evade Sunshine Act disclosures," not that they violated the Sunshine Act, not that they failed to make Sunshine Act disclosures, only -- and there's ample evidence of this -- that they held out IME -- and Your Honor mentioned this already -- to doctors as a means to evade Sunshine Act disclosures.

And even if we were wrong, despite the literal language, this is one subparagraph of the manner and means of one count.

MR. POLLACK: Your Honor?

THE COURT: Yes.

MR. POLLACK: May I make one point? I'll say "Dr. C." And there's a lot of stuff that's in the public record before today, too, and a lot of stuff in the civil case and other cases. I will say the witness A.D. was not actually a grand jury witness. She testified pursuant to a CID. We understand that the government made her -- at best we understand the government would have made her CID testimony, not grand jury testimony, available to a grand jury.

So I have two main points I just would like to get to. One is when the government said it disclosed through exhibits the existence of SpineFrontier making payments, that's with regard to two doctors. I'm not sure whether I should be using their initials here or their names, but it's Dr. C. and Dr. L., but I'm just -- that two doctors.

An exhibit was used from I think it's -- from a -- for a certain period of time as to them showing that SpineFrontier made some disclosures of its own payments. That's two as to a lengthy list, not that none was made by IME.

And I don't think someone can read paragraphs 37(c) and 37(d) and not have the reaction that Your Honor had or that we had that the government's theory was that IME was used to evade the reporting requirements, and that is just a different nature of the case.

And the test isn't *Twombly*, Your Honor. It's not a *Twombly*-type test of how did it plead? Are there different grounds? It's whether the Court can say it's comfortable that the jury was free from substantial influence on the way the case was presented. And it was presented to suggest -- that's the way it reads. That's the way the probable cause testimony improperly by [redacted] came across. It was used.

They used -- I can't think of his first name. His last name begins with an A. They were emails and two emails and one draft letter involving that person. It's a salesperson. It's a salesperson suggesting in 2013 and early 2014 what's become a central portion of today's discussion that -- to two doctors, a Dr. R. and a Dr. L., that IME could function some way to change what the reporting act reports are.

And they never were done that way. One salesperson makes those comments. [redacted] testifies --

THE COURT: But I will go back and read these papers again and double-check that I -- where this goes with

this different understanding in my mind. But the bigger part of this, which I think is part of why I didn't make this nuance, is that I do think you're overstating their reliance on the Sunshine Act piece of it. I think that's a -- it is a part of what they were reassuring the doctors about.

MR. POLLACK: Your Honor, not when it comes to specific intent, Your Honor. All they had was one salesperson writing a draft that [redacted] -- I'm sorry --

THE COURT: So -- but the finding here at the end of the day for the grand jury is not whether it's beyond a reasonable doubt on specific intent. The question is whether it was probable cause, right?

MR. POLLACK: And whether or not the finding of probable cause as to specific intent was substantially -- could have been substantially influenced by this misimpression created from them.

THE COURT: Okay. I will go back and review your briefing again on -- with that in mind. We don't have that much time, and I also want to deal with the attorney-client issue.

MR. POLLACK: The only to make sure -- it's in our reply brief, is with regard to the fact that, because the grand jury investigation lasted, I think, more than three years or about three years, there were definitely multiple grand juries.

So when Your Honor reviews these issues to determine whether the government may have given a misimpression or created confusion to the grand jury about the nature of this case and whether IME was actually used for its name to hide SpineFrontier making payments, when, in fact, SpineFrontier made all the disclosures, Your Honor, there were two -- there had to be, by timing, even if there was extension, at least two grand juries. We've asked for that information. The government has invoked Rule 6(c) that they can't tell us that.

In our reply brief -- and I think it's pages 2 and 3 or 3 and 4 -- we list about four or five cases that have found that the government cannot take a shortcut with a second grand jury. It would have been the second or third grand jury that would have indicted here.

So when you think about all the information that would avoid the confusion possibly -- and I don't think what the government has identified does it. An exhibit that shows two doctors were disclosed --

THE COURT: You need to stop here. We have other things we need to get to. I'll go back and read your reply brief carefully.

MR. POLLACK: Thank you, Your Honor.

THE COURT: I want to turn to the last motion -- or maybe it was the first motion, I don't know -- on the waiver

of attorney-client privilege or not. And it seems to be a little bit of sort of a chicken/egg question here of who's saying what about the doctor's letters.

So if I have an attorney -- if I have -- somebody sends an attorney letter out into the world for whatever their reason they're doing, at the moment they're sending that attorney letter out into the world, we don't have a waiver of the attorney-client privilege, correct?

MR. GEORGE: As stated, I agree, Your Honor.

THE COURT: Okay.

MR. GEORGE: But I don't think that's the circumstance here.

THE COURT: I know. I'm just moving very quickly -- very slowly here.

So right now -- so they send this letter out, and they send the letter out, in the government's view, as part of their scheme to engage in this bribery scheme. If the defendants -- and it's your obligation to show specific intent.

If the defendants -- if this case were to go to trial and you were to prove your case and put -- try to prove your case, including putting this letter in, the concern for the government is there we have -- we now have an attorney saying this is okay.

But when you're doing that, does that have them

relying at that stage yet on advice of counsel?

MR. GEORGE: So that's a separate question from waiver, right, Your Honor? You're talking about whether it's being used as a sword and a shield with fairness.

THE COURT: Okay. So then back me up a bit.

MR. GEORGE: Yeah.

THE COURT: There's no waiver when you simply use a letter in connection with something. So you're saying there's something more that's creating a waiver here. Tell me what you say the waiver is at this stage in the litigation.

MR. GEORGE: Yes, Your Honor. So at this stage, on the waiver point alone, what the letter says is that, for IME -- and this is Exhibit A to our motion, if you want to -- and I have it here if --

THE COURT: I have it.

MR. GEORGE: -- that we have acted as counsel only for IME and, quote, "This letter is intended only for IME and is limited to the attached agreement. This letter must not be copied or shared with and may not be relied upon by any other person without prior written consent from this law firm."

So this is not just -- for instance, they make the analogy to a pleading. We agree that if a lawyer takes a position in a pleading, that's not a waiver. If a lawyer

takes a conclusory position in a letter, that's not a waiver.

But there were underlying communications here, and this letter was intended to be confidential; and when they shared it with the world, despite the language in the letter, they waived the privilege.

THE COURT: Why do you say the letter was intended to be confidential?

MR. GEORGE: Because it says it's for IME only, Your Honor, and it says --

THE COURT: You're making an assumption there.

MR. GEORGE: I'm --

THE COURT: You're leaping to the conclusion that because a lawyer writes -- I mean, I will tell you every single email I've ever received from a lawyer has on the bottom of it "This is confidential and may not be used."

MR. GEORGE: I think that's more in the area of boilerplate. This is in the literal language of the letter.

THE COURT: So let's assume that the attorney put it in for some various different purposes. Right now what I have is a letter in -- a statement in a letter that you're saying I must accept for the truth that they were, in fact, of the view that this letter shouldn't be shared, rather than that, as part of this missive that they were creating, they wanted to make it look like a really authentic attorney-client document.

MR. GEORGE: Well, Your Honor, I think you get to an interesting burden question here. The burden to show the privilege on the letter is theirs.

THE COURT: No.

MR. GEORGE: To show that it's privileged if they wanted to show that it's privileged, which apparently they don't, the burden would be theirs. We're faced with the burden to show that they waived it.

THE COURT: So the first step is, if you have a letter from an attorney and you hand it out, however you're handing it out, does that mean you have waived the underlying communication? And I would suggest it's only when you've waived it, when you're using that letter in a way that would then cause the waiver.

I mean, you're saying any time an attorney's letter is handed out, all the conversations behind that attorney's letter are waived?

MR. GEORGE: No, I think it depends on the nature of the letter. And this letter said it was intended to be privileged, and they shared it. And it's not a pleading. It's not just a conclusory statement. There's -- they say, "Here's the analysis as to why you're not violating the kickback statute. And we intended this to be for you only." That sounds like a waiver.

Of course, I don't disagree that there are many,

many, situations, maybe even the vast majority of the situations, where a lawyer writes a letter and mere disclosure of the letter does not effect a waiver. I don't think that's the situation. They are analyzing to their client why they're not violating the anti-kickback statute.

THE COURT: But that happens -- I mean, lawyers write letters all the time to their clients for their clients to then use. And the question is then at what point are the things underlying it -- and I would suggest that the moment they want to say, "This negates our burden," they've absolutely waived the privilege.

But you're saying that the mere fact that the letter comes out, I get there and I differentiate out from every other lawyer letter that's floating around on the grounds that the lawyer marked it as confidential; and, therefore, it has worse ramifications than when the lawyer just wrote to them and didn't mark it as --

MR. GEORGE: Well, Your Honor, we can talk about the second part, but we did cite a case to you that deals with this situation. It's *Electro Scientific Industries, Inc. v. General Scanning, Inc.*, 175 F.R.D 539, and the issue was a patent opinion letter.

And the Court said this, quote, "I hasten to emphasize, moreover, that the fact that a party takes a position in a pleading that is consistent with advice that

party received in confidence from attorneys is irrelevant to its waiver analysis." And that's your point, I believe, Your Honor.

"A waiver analysis focuses on the disclosure of the content of specific communications between counsel and client, and a pleading would not effect a waiver unless the pleading disclosed specific lawyer-client communications, even if the substance of the pleading tracked what a lawyer had confidentially advised the client," end quote.

And I think, if you "substitute opinion letter" for "pleading" in this quote, that is the situation we have here. This is an analysis from these lawyers to their client. It says they're acting on behalf of their client only --

THE COURT: But --

MR. GEORGE: -- and this is why you will not be violating the kickback statute.

THE COURT: The distinction that I'm making that you're not wrestling with --

MR. GEORGE: I'm trying at least, Your Honor.

THE COURT: I appreciate that. But the distinction that I'm making is it's when the person is using it in the proceeding that you're engaged in that you now say you're using it; you've waived it. It's not the dissemination to the world writ large that waives the privilege as to that letter, but to get behind it.

MR. GEORGE: I agree with that, Your Honor. I'm sorry if I misunderstood. I think that's clearly the case from the First Circuit's case on this *In re XYZ Corp.* And the defendant's claim that this is only an extrajudicial disclosure, which I believe is the point Your Honor is making. But it's not. They say in their own opposition that they've -- they've mentioned that they're going to be relying on negating willfulness, and so --

THE COURT: I agree with you it's coming up.

MR. GEORGE: It's --

THE COURT: It's only a question of exactly when the timing is here.

MR. GEORGE: But, Your Honor, I submit they already have, because in meet-and-confers with us post indictment, they are telling us they intend to put forward evidence negating good faith. They have already done that. They say it on page 4 of their opposition to this motion. They're already doing it, and it's clear they will continue to do it.

THE COURT: So this is how I propose resolving this issue. First of all, have you -- what have you done to seek this information other than we are now in this confrontation?

MR. GEORGE: As Your Honor probably knows, the Department of Justice guidelines prohibit us from subpoenaing attorney information without going to the DAG's office, or I forget what the exact approval is. But we have not issued a

subpoena for this information because it's against department policy.

But if there's been a waiver and the Court orders that, then that's a different situation.

THE COURT: So the way I would like to proceed is have you -- and if you need to get permission, so be it; you go and try and get the permission -- but assuming you can get permission, that you make the demand for the information, which will be responded by specific objections and a privilege log.

And what I am trying to do there is tee up so we have exactly what is at issue so that the moment they put it at issue -- which I agree with you; I anticipate that they are going to -- but at the moment when they do put it at issue, we have the documents here ready to go. That would seem to me the framework.

And I understand that there's a -- you know, the urgency of how you prepare for trial and so forth. But it does seem to me that is just -- at this juncture, they're sort of able to -- I don't think you can say that the mere fact that that letter was out there and being used for these purposes out there waives it.

And I don't think the -- I agree with you that it certainly looks from their papers like this is where they're going to go with it or they may go with it. But at this

point, I don't think we've completely crossed that line.

MR. GEORGE: Your Honor, I mean, I understand you. I submit they have crossed this line, but I understand your position. And if that's the way you want to go, it would be helpful, as a matter of department policy, to get an order from the Court that says we should issue a subpoena for this information, and they're obligated to respond.

THE COURT: I will -- that's what I will -- that's the way I would intend to do it. I -- again, on all of this, I'll go back and go through it carefully. But what I would intend to do is to say the waiver has not yet happened, but there's a high likelihood it will happen. So let's get it teed up. You can make your -- issue your subpoena.

They can -- I mean, you could also -- they can challenge it as overbroad. It can be challenged for other reasons. But I'm focusing on the privilege, that it will need to be responded with a privilege log, and then we will be teed up to resolve the issue in the event that this comes forward.

MR. GEORGE: Thank you, Your Honor.

THE COURT: Any objections from the defendants in proceeding that way?

MR. MARX: No, Your Honor. And I certainly don't want to steal defeat from the jaws of victory. But that being said, I do think at some point it would be useful well

in advance of trial to further flesh out the question Your Honor started with, which is what happens if the government in its case in chief presents, for example, this letter as part of its case?

Does that somehow force the defendants into making an advice of counsel defense and triggering the further obligations? And I think our position is -- and we're happy to brief this, and I know you have an eleven o'clock to deal with later -- our position would be, no, it doesn't. They've charged this as a criminal case. The burden is on them. And it's -- the defendants have a constitutional right to take the defense as it comes at trial.

THE COURT: It seems to me that if the government puts that letter in, they'd be entitled to a hearsay instruction that it is not being offered for the truth of any of the statements, and the jury may not consider whether any of the statements in there are true; but it's being offered as part of the course of what was happening, and the jury may consider this letter was sent.

And then that will put the burden back on you to decide how you want to respond to that, whether you want to make an argument that they got that letter because that's what they thought.

And the moment anything crosses in that way, which including in cross-examination -- I mean, it's not that you

would have to affirmatively put something on, but as soon as you put that issue in that they somehow thought this was correct rather than they thought this was corrupt and --

I mean, if the government puts it in, they're going to be putting it in to say, as part of their scheme, they created this letter and I will tell the -- I mean, frankly, I will probably tell the jury that they shouldn't consider anything about whether this is a real law firm, whether there's a real opinion here, anything other than what it says on its face, because they can't take it for the truth of it. They take it for the letter -- this is a copy of the document that was forwarded.

Right? Why would that be wrong?

MR. MARX: Well, I don't want to get too close into how to particularly instruct the jury about this exhibit, but I certainly could be concerned if the instruction suggested to the jury this was anything other than a real law firm and a legitimate opinion letter --

THE COURT: I can't --

MR. MARX: -- because it is.

THE COURT: I know, but you can put that in.

MR. MARX: Well --

THE COURT: You can -- but I don't think -- I think the government -- I think the government is entitled to say here's an email that went from this person to this person and

we're going to authenticate that this is the email, and this is the attachment; and that this is a hearsay document, and it cannot -- no part of it can be accepted for the truth of the matter.

You don't get to have them verify that this is a real law firm or me verify that it's a real law firm.

MR. MARX: Right. And this is what I think is -- probably would benefit from further discussion at a later hearing. But I think there's a line between the jury hearing the fact, whether it's through cross-examination or a defense presentation, that this is a real law firm and a real letter and not the veneer of legitimacy that was, you know, created by some fraud, but it's a real letter.

There's a difference between that and an advice of counsel defense at trial which --

THE COURT: Why? What's the difference?

MR. MARX: Because under First Circuit cases law cited in our briefs, the jury is allowed to infer -- again, keeping in mind it's their burden to prove willfulness beyond a reasonable doubt. The jury is entitled to infer, by the presence of innocent parties, especially lawyers, that no one would engage in this kind of brazen fraud with lawyers looking at the contracts and writing these kinds of letters unless --

THE COURT: But you're asking to have that innocent

party without having any information about -- what you're trying to do is try to make sure this letter comes in without any information as to what information defendants told the lawyers.

MR. MARX: Yes, because there's two separate things. There's the fact that there was a lawyer in the room, and then there's advice that a defendant may have relied on from the lawyer. Those are separate facts that --

THE COURT: Yeah, but you want to get the fact -- you want to have -- so you're saying -- and I'll go back and read that case. But you're saying that they can infer from the fact that a lawyer was in the room that this is a legitimate legal opinion without having to get into the question --

MR. MARX: No, Your Honor. No, Your Honor. That's not what I'm saying. So I don't want to suggest that I'm going that far, because I'm not. It's just that the fact that there is an innocent attorney involved -- it could be anyone -- the fact that it is on an attorney, the jury can infer what they want. But the fact there's anyone involved belies the allegation of conspiracy and tends to rebut the allegations of specific intent, as it would in any drug case, Your Honor.

That's why there's, you know, a mountain of First Circuit cases saying conspirators do not invite

innocent bystanders into the room when they engage in their illegal activity. This is a person in the room while this alleged activity is going on, separate and apart from whatever advice that person may have given, that that fact I think is one the jury is allowed to draw an inference from.

THE COURT: I don't see how you can put that person in as an innocent person in the room on the record as I have it without anything more.

I mean, you're going to say that you get -- that they don't get to -- I'll go look at those cases, but I do not see how you can have it both ways. I see that they may be stuck having to put that letter in front of the jury and -- if they want to use it. And no matter how much I instruct the jury, the jury will then go and -- there's the risk that the jury will read it and say, well, that beats reasonable doubt.

But to me, the moment you're making that pitch and you are giving that letter legitimacy beyond it being a hearsay document, I don't see how you can do that. I will go back and read those cases. But the idea that it's the same thing to have a letter from a counsel that we don't know what they're told, we don't know on what basis they did this, whether they're, in fact, innocent, whether they're part of the conspiracy or not part of the conspiracy, we have no idea about that at this point.

Okay. I'm getting a note that maybe the next hearing is --

We've got a problem here with the next hearing?

THE DEPUTY CLERK: Yes, Your Honor.

(The Court and deputy clerk confer.)

THE COURT: I think, despite my telling you I have an eleven o'clock hearing, I think I'm also sort of where I need to be in going through this, and I am going to go back and parse through this all a little bit more.

But that's -- where I'm intending to go with this at this point is denying the motion as to 1 through 7, granting the motion as to 8, and on the attorney-client privilege, laying out my thinking that there's not quite a waiver yet, but small things will make there be a waiver.

MR. POLLACK: Your Honor, on that last point, I just want to make sure we had a chance, we -- you asked if anyone objected. We don't object to that path for the attorney-client privilege so long as it makes clear that there's not yet a waiver. And I think you said --

THE COURT: Right. That's what I'm --

MR. POLLACK: I wouldn't want to be accused of not objecting --

THE COURT: No.

MR. POLLACK: -- if it's any different.

And there is one unique issue to my client,

SpineFrontier, on that privilege issue, which is they're in-house counsel.

So I think this is a matter of motions in limine, if we get that far. I'm hoping Your Honor will go back and read the arguments for Counts 1 through 7 and revisit that. But if we get that far, I think these are motions in limine because the entity was charged too, and it has in-house counsel and in-house counsel who worked on disclosures, and it worked on the contracts.

So it's -- I think it's a more complicated issue, and I think Your Honor trying to have the government see what it can do to build a record makes sense, because this is not one that should probably be decided without a record for it.

THE COURT: Right. I mean, I think the way I envision -- the way I'm picturing this going is that there is going to be a likelihood at some point, if this case is going to trial, that we're going to have tee up what it means that somebody signed this.

And I think if we have set up so that it's very clean to figure out what everybody's arguments are of -- you know, there may be a waiver, but the waiver may have limits to its scope of how far afield we're going. Obviously, in-house counsel presents further complications on this. But we'll tee it up this way.

MR. GEORGE: Your Honor, one last thing?

THE COURT: Sure.

MR. GEORGE: Would you be open to hearing from the government further on Count 8 on the point of concealment in a brief filing to just make clear the concealment is about the nature and ownership of IME? That's what --

THE COURT: I understand that's your argument.

MR. GEORGE: Okay.

THE COURT: And I will go back and put it against my sense of what it is that does or doesn't have to be concealed and what the case law says about what it is. But I do very much understand that that is what the government is saying is --

MR. GEORGE: All right. Thank you.

THE COURT: So we're in recess.

(Court in recess at 11:11 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Robert W. Paschal, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 30th day of April, 2024.

/s/ Robert W. Paschal

ROBERT W. PASCHAL, RMR, CRR
Official Court Reporter